

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs November 22, 2005

STATE OF TENNESSEE v. CARLOS HARDY and ATLANTA HARDY

**Appeal from the Criminal Court for Davidson County
No. 2002-D-1927 J. Randall Wyatt, Jr., Judge**

No. M2004-02249-CCA-R3-CD - Filed February 10, 2006

The appellants, Carlos and Atlanta Hardy, were convicted by a jury of second degree murder. As a result, the trial court sentenced Atlanta Hardy as a career violent offender to sixty years at one hundred percent to be served consecutively to the sentence she was already serving. Carlos Hardy was sentenced to twenty-five years at one hundred percent to be served consecutively to the sentence he was already serving for a probation violation. Both appellants filed timely motions for new trial. The trial court denied the motions, and the appellants appealed. On appeal, Carlos Hardy challenges the sufficiency of the evidence, the trial court's failure to declare a mistrial after a State's witness mentioned a lie detector test, the trial court's failure to sever his case from Atlanta Hardy's case, and his sentence. Atlanta Hardy challenges the sufficiency of the evidence and the trial court's failure to declare a mistrial. For the following reasons, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court is Affirmed

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES and DAVID G. HAYES, JJ., joined.

Michael A. Colavecchio, for the appellant, Carlos Hardy and Ronald E. Munkeboe, Jr., for the appellant, Atlanta Hardy

Paul G. Summers, Attorney General and Reporter; David E. Coenen, Assistant Attorney General; Victor S. Johnson, District Attorney General; and Kathy Morante, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

The appellants were indicted on October 18, 2002, by the Davidson County Grand Jury for the first degree premeditated of Brian Hunter. Prior to trial, both Carlos and Atlanta Hardy filed a motion to sever the cases. The trial court denied the motions, determining that "because the State

will not introduce the contradicting statements of either defendant implicating the other . . . , that any potential Bruton problem is avoided The Court is of the opinion that in the interests of fairness and judicial economy, it is appropriate that . . . [they] be tried together as co-defendants.”

Subsequently, the appellants’ joint trial was held on March 16 and 17, 2004. At trial, the following evidence was presented. Charles Carter, the godfather of Carlos Hardy’s child, testified that he knew both of the appellants. Carlos Hardy contacted Mr. Carter in 2001 or 2002 to “start a lawncare company.” The two started Hardy Lawncare and quickly got jobs cutting grass for commercial and residential customers. At some point thereafter, Brian Hunter, the victim, asked Mr. Carter if he could join the business, “so [Mr. Carter] talked to Carlos [Hardy] about it, including him in on the business.” Mr. Carter bought the first lawnmower for the business, and at some point the victim bought a second lawnmower for \$7,500.

Carlos Hardy was in charge of the money of the business. Mr. Carter explained that Carlos Hardy paid him, but he did not know if he paid the victim or not. At some point, the victim became angry at Carlos Hardy because he “felt like he wasn’t . . . being treated fair or Carlos wasn’t doing him right about the money.” The victim went so far as to threaten Carlos Hardy. According to Mr. Carter, the business was supposed to pay the victim back for the lawnmower he purchased for \$7,500.

On June 7, 2002, Carlos Hardy and Atlanta Hardy came to Mr. Carter’s house to pick him up to go to River Park to “cut some brush.” Atlanta Hardy was in the truck because “[s]he needed some money to get a car, or something, out of pawn.” Atlanta Hardy was Carlos Hardy’s cousin and had worked with them before in the lawncare business when she needed money because she was “proficient in cutting grass.” Carlos Hardy was going to pay Atlanta Hardy two hundred dollars for her work that day.

On the way to River Park, the victim called Mr. Carter about getting paid for the lawnmower. Mr. Carter explained to the victim that they did not have any money, but told him that he would “see what [he] could do.” Mr. Carter stated that he went to “West End and got seven hundred and fifty dollars” and figured that the money would “calm” the victim down. The trio went to a duplex on 16th Street at about 12:30 p.m. where they kept their lawn equipment. The victim arrived in his car shortly thereafter. Mr. Carter explained that the victim was “smiling, joking, like he always [was].” At that time, Mr. Carter and the victim went into the duplex where Mr. Carter paid the victim the seven hundred fifty dollars and told him to let the “conversation between you and Carlos, you know, let that die.” At that point, according to Mr. Carter, the victim started talking loud, “some kind of rhetoric, . . . intentionally so Carlos could hear it.” Mr. Carter testified that Carlos Hardy entered the duplex and told the victim that he wanted him “out of the business.” Atlanta Hardy followed Carlos Hardy into the duplex and the victim “said a derogatory term, you know, ‘I don’t want this bitch in here.’”

Mr. Carter testified that after the victim called Atlanta Hardy “a derogatory term,” Mr. Carter saw Atlanta Hardy point a gun at the victim. The victim started to back up and asked Mr. Carter for

help. Mr. Carter stated that he stepped in front of the victim and told Atlanta Hardy that “it ain’t gotta go down like this.” Mr. Carter testified that Atlanta Hardy told him to “move.” Mr. Carter stated that the gun went off, and he dropped to the floor. After dropping to the floor, Mr. Carter saw Carlos Hardy holding a gun. Mr. Carter crawled out of the duplex.

Once Mr. Carter got outside, he told Albert Claybrooks, who was standing outside the duplex, that Carlos Hardy and Atlanta Hardy were inside killing the victim. Mr. Carter testified that he heard the victim screaming and heard multiple shots. After the gunfire ceased, Carlos Hardy and Atlanta Hardy came out of the duplex and told Mr. Carter to leave with them. Mr. Carter refused, so the two Hardys left together in the truck. Mr. Claybrooks drove away from the area in his own car. At that time, Mr. Carter walked back into the apartment to look at the victim. “He was facing twisted, laid down like this (indicating), looking everywhere in a pool of blood.” Mr. Carter told the woman who lived in the front duplex to call the police and then he left the scene because he was on probation for drug charges and “got nervous.”

A few days after the incident, Mr. Carter spoke with Detective Coleman of the Metro Nashville Police Department about the shooting. Mr. Carter admitted that he initially tried to protect Carlos Hardy by telling the police that he did not see Carlos Hardy with a gun, but later told the truth about the shooting. Mr. Carter commented at trial during his testimony that he took a lie detector test at the police station.

Albert Claybrooks, a friend of Mr. Carter’s, testified that he knew both of the appellants. On June 7, Mr. Claybrooks saw both of the appellants and Mr. Carter at the duplex and drove up to see them. When he drove up, Mr. Carter and Carlos Hardy were “[j]ust sitting out back.” Mr. Claybrooks testified that they sat out back and talked as Mr. Carter and Carlos Hardy waited on the victim to arrive so that they could “pay him some money.” Mr. Claybrooks stated that the victim arrived about a half an hour later. When the victim arrived, he and Mr. Carter entered the duplex. Mr. Claybrooks stayed outside with Carlos and Atlanta Hardy and made “small talk.” A few moments later, Carlos Hardy entered the duplex. As Carlos Hardy entered the duplex, Mr. Claybrooks asked him to ask the victim to move his car. Atlanta Hardy followed Carlos Hardy inside shortly thereafter.

Mr. Claybrooks remained outside the duplex, waiting for the victim to move his car. As he waited, he heard an argument inside the duplex. Then, he “heard a gunshot It kind of scared [him], because [he] wasn’t expecting that.” Mr. Claybrooks explained that after the shot went off, Mr. Carter ran out the door “immediately.” Mr. Claybrooks did not see Mr. Carter with a weapon and Mr. Carter appeared “shook [sic] up.” Once Mr. Carter exited the duplex, Mr. Claybrooks heard more shots and some screaming and shouting. After the shots were fired, the appellants exited the duplex, headed toward their vehicle and left. Mr. Claybrooks did not see the victim exit the duplex, so he knew that “something happened.” At that time, Mr. Claybrooks left the area.

Officer Christopher James Brennan of the Metro Nashville Police Department investigated the murder of the victim. When he arrived at the scene, Officer Brennan saw the victim’s car in the

alley with the engine running and the stereo playing. There were other officers already on the scene when he arrived, but the victim's body was still in the apartment. Officer Brennan stated that the victim was "laying partially in between the kitchen area and what appeared to be the living room area." The officer collected five shell casings and three "projectiles," or bullets. The officer also found three taped packages "that look[ed] [like] they were taped in a . . . brick, a flat package that we found in a plastic bag that was stuffed down inside another bag in the living room. . . . That those taped packages had been opened. And what was ever inside of them had been taken out." Officer Brennan explained that the packages looked like those that ordinarily contained cocaine. Officer Brennan explained that the victim was found in his white underwear with his jeans around his ankles. The victim's car contained a Glock seventeen, nine-millimeter handgun in the trunk and a "green leafy substance" in several mason jars in the center console.

Maria Hardy, the sister of Atlanta Hardy and cousin of Carlos Hardy, testified that sometime on the afternoon of June 7, Atlanta and Carlos Hardy arrived at her grandmother's house at 3007 Hummingbird Drive. Maria Hardy explained that she:

[C]ame down the steps. And when I came down the steps, . . . I seen [sic] my sister. And I was asking my sister, I said 'what's going on, you know? What have you done?' And the next thing I know, Carlos came. And he said, 'I need to talk to you, Kita. Kita is Atlanta Hardy. He called her Kita. So she said, 'whatever you've got to say to me, you can say it right here.' So, then, about that time, Carlos shut the door. And he said that . . . he told Kita the check should be in the mailbox and stuff like that He told her, you know, he was gonna take care of her I did hear him say he was gonna take care of her.

Maria Hardy testified that Carlos Hardy wanted Atlanta Hardy to "take the rap for him." Maria Hardy then heard Carlos Hardy tell Atlanta Hardy that she should get a wig, leave town and go to Detroit.

Marion Ford, Atlanta Hardy's mother and Carlos Hardy's aunt, testified that she also saw the appellants at the home on Hummingbird Drive on the afternoon of June 7. When the appellants pulled up to the house in a truck, they asked Marion Ford and her mother to come inside. Once they got inside the house, Carlos Hardy informed them three times that he "killed a guy." At that point, Marion Ford claimed that the phone rang and Carlos Hardy ordered her not to answer the phone. Carlos Hardy took the phone, broke it and threw it across the room. Ms. Ford then testified that Carlos Hardy went around closing curtains. Carlos Hardy informed Ms. Ford that he hid the gun under the mattress. At that point, Ms. Ford claimed that Carlos Hardy got the gun, wrapped it into a quilt and brought it back into the kitchen. Ms. Ford took the gun, put it in a plastic Kroger bag and drove off "on the highway." According to Ms. Ford, she drove to exit 24, where she "pitched it out." Ms. Ford later informed the police where she allegedly disposed of the gun. The gun was never located.

Wayne L. Hughes, an officer with the Metro Nashville Police Department's Forensics and Firearms Unit, testified as an expert in firearms and toolmark identification. According to Officer Hughes, the bullets fired at the crime scene could not have been discharged from the gun found in the victim's car. The officer explained that the .380 caliber bullets and shell casings found at the crime scene came from the same firearm. Officer Hughes also stated that the two .22 caliber bullets from the crime scene came from the same firearm.

John E. Gerber, a medical examiner with Forensic Medical in Nashville, testified as an expert in forensic pathology. Dr. Gerber performed the autopsy on the victim. According to Dr. Gerber, the victim was shot eight times: on the left back of the head; on the left side of the head; on the right side of the jaw; twice in the upper left chest; in the upper left back; in the right lower back; and in the right arm. Dr. Gerber also located gunpowder stippling on the victim's "right lateral portion of the wrist and base of the thumb," meaning that the handgun was between "six inches and two feet away" from the victim when it was fired. Dr. Gerber explained that the stippling was not caused by the victim firing a gun, but rather by someone else shooting the victim at a very close range. Dr. Gerber described the cause of death as "multiple gunshot wounds of the head, torso, and the right upper extremities."

Samuel Holt, Carlos Hardy's stepfather, testified that Carlos Hardy told him that Atlanta Hardy "killed a man" on the afternoon of June 7. Mr. Holt testified that about fifteen minutes after Carlos Hardy informed him about the shooting, Atlanta Hardy approached him and Carlos and began talking about the murder. According to Mr. Holt, Atlanta Hardy laughingly admitted that she shot the victim several times, then went through his pockets to see if he had any money.

Carlos Hardy testified on his own behalf. He stated that he owned a lawncare service named Hardy's Lawncare and that Mr. Carter worked with him in the business. According to Carlos Hardy, he gave Mr. Carter a job because he "was a friend of mine from way back He was in a Federal Halfway House. You know, I gave him a job to try to help him out." Carlos Hardy explained that he was "real good friends" with the victim. He claimed that Mr. Carter wanted to bring the victim into the business, but he was hesitant. According to Carlos Hardy, the victim and Mr. Carter purchased a lawnmower. Carlos Hardy claimed that the business "didn't need no [sic] equipment."

On the day of the murder, Carlos Hardy explained that Atlanta Hardy called him and told him that she "needed some money, to work." Initially, Carlos Hardy did not want to offer Atlanta Hardy a job, but felt a duty to do so, because she was "family." Carlos Hardy and Atlanta Hardy drove to Mr. Carter's house to pick him up. On the way there, Carlos Hardy received a telephone call from the victim, who wanted money. Once the two picked up Mr. Carter, they drove to the duplex on 16th Avenue where they stored all of their equipment. Shortly after they arrived, Albert Claybrooks came by the duplex. Carlos Hardy explained the victim showed up shortly thereafter. According to Carlos Hardy, Mr. Carter and Mr. Claybrooks went into the duplex to discuss something, then came back out.

Then, Mr. Carter and the victim entered the duplex. At that point, Carlos Hardy claims that he heard “arguing.” Carlos Hardy claims that he went “in to see what they was [sic] arguing about.” Carlos Hardy realized that the two were arguing about the money for the lawnmower. Atlanta Hardy entered the duplex. Carlos Hardy claims the victim asked, “who is this bitch?,” referring to Atlanta Hardy. At that point, Carlos Hardy claims that the victim went toward Atlanta Hardy, then he heard shots. He admitted that he did not see the victim with a gun, but that he did see Atlanta Hardy with a weapon. Once he heard shots, Carlos Hardy explained that his main focus was going out of the door. Carlos Hardy testified that he did not have a gun that day. Atlanta Hardy exited the duplex after Mr. Carter. The two appellants left in the truck.

Carlos Hardy claimed that Atlanta Hardy dropped him off at his grandmother’s house. He stated that Ms. Ford was not present and that he explained everything to his grandmother. Later, Atlanta Hardy and a friend named “Poochie” showed up at the house. Carlos Hardy testified that he told his stepfather that Atlanta Hardy shot the victim, but did not listen to the conversation that Atlanta Hardy had with his stepfather.

On cross-examination, Carlos Hardy admitted that he wrote the victim a check for \$1,600 three days prior to the murder, but denied that he stopped payment on the check. Instead, he claimed that there was not enough money in his account to cover the check.

Atlanta Hardy testified that she worked on a couple of occasions with her cousin Carlos Hardy in his lawncare business. On the day of the murder, Carlos Hardy picked her up and the two drove to pick up Mr. Carter. When the three arrived at the duplex where the equipment was kept, Mr. Carter exited the vehicle while she and Carlos Hardy stayed in the truck. Atlanta Hardy remembered that Mr. Claybrooks arrived approximately five minutes later and went into the apartment. After Mr. Claybrooks and Mr. Carter exited the duplex, the victim pulled up in a black Monte Carlo.

According to Atlanta Hardy, Mr. Carter and the victim then entered the duplex. She claimed that she could not hear loud voices coming from inside. Atlanta Hardy stated that Carlos Hardy entered the duplex and “the next thing [she] heard” was a gunshot. When she turned around, Mr. Carter exited the duplex, followed closely by Carlos Hardy. Carlos Hardy got in the truck with Atlanta Hardy, and he drove the two to their grandmother’s house. Atlanta Hardy testified that Carlos Hardy asked her to “take the rap for him” and instructed her to go to Detroit.

Atlanta Hardy stated that when she saw her photograph on television, she got a lawyer and went to the police station to give a taped statement to “let ‘em know that [she] hadn’t done anything wrong.”

On cross-examination, Atlanta Hardy admitted to several prior felony convictions, but denied ever entering the duplex on the day of the murder. She claimed that everyone was trying to “frame” her for the murder.

Patricia Owens lived in the front portion of the duplex on 16th Avenue North where the victim was murdered. She testified that she was laying on her sofa when she heard a “ruckus.” Ms. Owens got up off her sofa, went to the door, heard what sounded like gunshots and called the police. After the gunshots were fired, Mr. Carter came to her door and asked to use her telephone. Ms. Owens claimed that she also called her husband, and that Mr. Carter spoke to him. She saw Mr. Carter get into a car and leave the area.

Following the presentation of the evidence, the jury convicted both of the appellants of the lesser-included offense second degree murder. At a sentencing hearing, the trial court sentenced Atlanta Hardy as a career violent offender and sentenced her to sixty years to be served at one hundred percent for second degree murder to be served consecutively to the sentence she was already serving. The trial court sentenced Carlos Hardy as a Range I violent offender to twenty-five years, to be served consecutively to the sentence he was already serving as a result of committing the murder while on probation for another offense.

Both appellants filed timely motions for new trial. The trial court denied the motions after a hearing. On appeal, Carlos Hardy argues that the evidence was not sufficient to support the conviction, that the trial court erred by failing to declare a mistrial when a State’s witness testified that he had taken a lie detector test, that the trial court erred by failing to sever the two cases, that the trial court erred by failing to specify exactly how the sentence was derived and that the trial court erred by failing to specify why the sentence was ordered to run consecutively to the sentence he was already serving. Atlanta Hardy challenges the sufficiency of the evidence and the trial court’s failure to declare a mistrial.

Analysis

Denial of the Motions to Sever

Appellant Carlos Hardy argues on appeal that the trial court erred in failing to sever his case from appellant Atlanta Hardy’s case. In support of his argument, the appellant argues that without a severance, he “would suffer prejudicial harm in being unable to place this testimony [the statement given by Atlanta Hardy to the police in which she denied being inside the duplex during the shooting] before the jury, as it is totally inconsistent with the testimony to which the Appellant submits that every other witness will testify.” Thus, Carlos Hardy argues, he was unable to “call the credibility of co-defendant Atlanta Hardy into question, thus destroying a valuable defense strategy.” The State argues that Carlos Hardy has waived the argument for failure to cite to applicable portions of the record or, in the alternative, that the trial court did not abuse its discretion in denying the motion to sever.

The State correctly points out that the appellant fails to cite to the record in his brief. Ordinarily, “issues which are not supported by . . . appropriate references to the record will be treated as waived in this Court.” Tenn. Crim. App. R. 10(b). Nonetheless, we elect to review the appellant’s contention despite his failure to comply with the rules of this Court.

A trial court shall grant a pretrial motion to sever if it is “deemed appropriate to promote a fair determination of the guilt or innocence of one or more defendants.” Tenn. R. Crim. P. 14(c)(2)(i). Whether a severance should be granted is a matter entrusted to the sound discretion of the trial court, and a reviewing court may not disturb the trial court’s ruling absent an abuse of discretion that resulted in clear prejudice to the defendant. See State v. Hutchison, 898 S.W.2d 161, 166 (Tenn. 1994). Indeed, the Tennessee Supreme Court has stated that:

The state, as well as the persons accused, is entitled to have its rights protected, and when several persons are charged jointly with a single crime, we think the state is entitled to have the fact of guilt determined and the punishment assessed in a single trial, unless to do so would unfairly prejudice the rights of the defendants.

State v. Carruthers, 35 S.W.3d 516, 552-53 (Tenn. 2000) (quoting Woodruff v. State, 51 S.W.2d 843, 845 (Tenn. 1932)). This Court has held that “[w]here a motion for severance has been denied, the test to be applied by this court in determining whether the trial court abused its discretion is whether the defendant was ‘clearly prejudiced’ in his defense as a result of being tried with his codefendant.” State v. Price, 46 S.W.3d 785, 803 (Tenn. Crim. App. 2000) (quoting State v. Burton, 751 S.W.2d 440, 447 (Tenn. Crim. App. 1988)).

In the case herein, the trial court made the following findings of fact and conclusions of law with regards to the severance:

Homicide Detectives obtained statements from Carlos Hardy, Atlanta Hardy, and Charles Carter. The statements of Carlos Hardy and Charles Carter both indicate that all three parties entered the apartment Mr. Hardy and Mr. Carter stated that once inside the apartment, Atlanta Hardy produced two handguns and shot the victim several times, causing his death.

Atlanta Hardy gave a conflicting statement Mrs. Hardy stated that she rode with her cousin, Carlos Hardy, and Charles Carter to the victim’s apartment complex on June 7, 2002. Mrs. Hardy stated that Mr. Hardy and Mr. Carter went into the . . . apartment to collect two thousand dollars, while she remained in the truck. Mrs. Hardy stated that she saw the victim pull up to the apartment complex and go inside. Approximately fifteen minutes later, she heard gunshots and saw Mr. Hardy and Mr. Carter run out of the apartment. Mrs. Hardy stated that Mr. Carter got into a Pontiac Grand Am, and Mr. Hardy got back into the truck and drove off without saying a word.

The co-defendants, . . . , both move for a severance, alleging that, if admitted into evidence, the conflicting statements of either defendant would violate the other’s right of confrontation. Co-defendant Carlos Hardy also alleges that he would be prejudiced by his co-defendant Atlanta Hardy’s criminal history.

The State has indicated that it will not offer to admit the statements of either defendant into evidence at trial.

. . . .

As indicated above, the Court finds that the State does not intend to introduce the statement of Atlanta Hardy into evidence. The Court is therefore of the opinion, because the State will not introduce the contradicting statements of either defendant implicating the other in the homicide, that any potential Bruton problem is avoided.

Defendant Carlos Hardy also alleges that a severance is required to protect him from being unduly prejudiced by the co-defendant Atlanta Hardy's criminal history. While the Court is doubtful that Atlanta Hardy's criminal history will be admitted at trial, the Court will properly instruct the jury to give separate consideration to each defendant. The Court will instruct the jury that each defendant is entitled to have their respective case decided on the evidence and law which is applicable to them, and that any evidence which is limited to a particular defendant should not be considered as to any other defendant. The Court is of the opinion that in the interests of fairness and judicial economy, it is appropriate that Carlos Hardy and Atlanta Hardy be tried together as co-defendants.

Carlos Hardy has failed to show that he was "clearly prejudiced" in his defense as a result of being tried with Atlanta Hardy. Id. at 803. The State did not introduce the statements of either appellant at trial. Carlos Hardy argues that the State did not elicit testimony from the investigating detective about Atlanta Hardy's statement or introduce the statement in and of itself and that he was therefore unable to call the credibility of Atlanta Hardy into question even though her the statement was inconsistent with the testimony other witnesses. We fail to see how Carlos Hardy could have cross-examined the detective as to the veracity of appellant Atlanta Hardy's statement. Further, Atlanta Hardy testified at trial and her testimony regarding her participation or lack or it in the shooting was consistent with the statement she gave to police. Thus, Carlos Hardy could not have introduced Atlanta Hardy's statement to the police as a prior inconsistent statement. Moreover, the proof that Carlos Hardy argues never went to the jury (i.e. testimony contradicting Atlanta Hardy's statement which in turn questioned her credibility) did in fact go to the jury as a result of Atlanta Hardy's testimony at trial which painted a different version of the events from the testimony of other witnesses. Finally, both appellants testified at trial and both were given the opportunity to cross-examine the other. Carlos Hardy has failed to show that he was prejudiced by the lack of a severance. This issue is without merit.

Failure to Declare a Mistrial

Next, both Carlos Hardy and Atlanta Hardy argue that the trial court "erred in not calling a mistrial when the key State's witness testified that he had taken a lie detector test as it related to the facts of the case." The State argues that the appellants have both waived the issue for failure to cite

to the record, for failure to make a contemporaneous objection during trial and for failure to request a curative instruction.

In the case herein, when asked on direct examination whether he went to the police department to see Detective Coleman, Charles Carter replied, “Yeah. I went and saw him. Yeah, I - I took a lie detector test.” Neither appellant made a contemporaneous objection at trial or requested a curative instruction.¹ At the conclusion of the first day of the trial, the trial court asked the attorneys the following:

My question to either of you or both of you, I can, in the morning, make a brief instruction to the jury that Mr. Carter made reference to the fact that he had taken a polygraph, and that’s not admissible in Tennessee, and so forth. Do either side of you want that or would you prefer to just let it alone and not make a lot of to do about it or what’s your thoughts?

Counsel for Atlanta Hardy informed the trial court that he “didn’t object at the time, . . . because, . . . I did not want to bring attention to it. It was a very brief moment. Still, I don’t know what effect it had or will have or whether they [the jury] even heard it” The next morning, counsel for Carlos Hardy agreed with the trial court, stating, “I don’t think we need to bring any more attention to it [the mention of the lie detector] than has already been - what little has already been brought in He didn’t say I went in and passed a polygraph or I failed a polygraph. He just mentioned the word I don’t think it’s worth adding to the trial.” Counsel for Atlanta Hardy agreed.

The purpose of a mistrial is to correct the damage done to the judicial process when some event has occurred which would preclude an impartial verdict. See Arnold v. State, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1977). The decision whether to grant a mistrial is within the trial court’s discretion and will not be disturbed absent an abuse of that discretion. State v. Millbrooks, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991). “Generally a mistrial will be declared in a criminal case only when there is a ‘manifest necessity’ requiring such action by the trial judge.” Id. The authority to discharge a jury is to be exercised only when there is a cogent reason or manifest necessity. Jones v. State, 403 S.W.2d 750, 754 (Tenn. 1966).

Initially, we note that neither appellants’s brief cites to any portion of the appellate record with regard to this issue. As stated above, ordinarily, “issues which are not supported by . . . appropriate references to the record will be treated as waived in this Court.” Tenn. Crim. App. R. 10(b). Further, neither appellant made a contemporaneous objection during trial or requested a curative instruction even after the trial court’s offer to do so. The failure of either appellant to object during the trial or request a curative instruction constitutes a waiver of this issue. Tenn. R. App. P. 36(a) (stating that “Nothing in this rule shall be construed as requiring relief be granted to a party

¹Interestingly, both appellate briefs claim that, “Defense counsel made a contemporaneous objection.” However, these alleged objections do not appear in the record of this appeal.

responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.”); State v. Cravens, 764 S.W.2d 754, 757 (Tenn. 1989).

Despite the obvious waiver of this issue, this Court may address the issue in the event there was plain error on the part of the trial court. State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000). Thus, if this Court is to review the claim that the trial court failed to declare a mistrial after Mr. Carter’s testimony we must do so through the process of “plain error” review embodied in Tennessee Rule of Criminal Procedure 52(b) which provides:

An error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for a new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do substantial justice.²

In order to review an issue under the plain error doctrine, five factors must be present: (1) the record must clearly establish what occurred in the trial court; (2) a clear and unequivocal rule of law must have been breached; (3) a substantial right of the defendant must have been adversely affected; (4) the accused did not waive the issue for tactical reasons; and (5) consideration of the error is necessary to do substantial justice. See Smith, 24 S.W.3d at 282-83; State v. Adkisson, 899 S.W.2d 626, 641 (Tenn. Crim. App. 1994); see also Tenn. R. Crim. P. 52(b). For a “substantial right” of the accused to have been affected, the error must have prejudiced the appellant. In other words, it must have affected the outcome of the trial court proceedings. United States v. Olano, 507 U.S. 725, 732-37 (1993) (analyzing the substantially similar Federal Rule of Criminal Procedure 52(b)); Adkisson, 899 S.W.2d at 642. This is the same type of inquiry as the harmless error analysis under Tennessee Rule of Appellate Procedure 36(b), but the appellant bears the burden of persuasion with respect to plain error claims. Olano, 507 U.S. at 732-37.

In the case herein, we are not persuaded that either appellant has successfully carried the burden of persuasion in establishing a plain error claim. First, the record is fairly clear as to what happened in the trial court. Neither appellant objected to the statement made by the witness nor did either appellant request a curative instruction even when the trial court offered to do so. Further, counsel for both appellants admitted that they waived the issue for tactical reasons. The appellants have not shown the existence of the five factors necessary for plain error review. This issue is waived.

Sufficiency of the Evidence

²This rule by its terms allows plain error review only where there is a failure to allege error in the new trial motion or where the error is not raised before the appellate court. Nevertheless the rule has been interpreted by the appellate courts to allow appellate review under some circumstances in the absence of a contemporaneous objection as well.

Next, both appellants contend that the evidence presented at trial does not support their convictions for second degree murder. In fact, their arguments are identical. Specifically, they argue that “[g]iven the numerous inconsistencies in Charles Carter’s testimony, the conflicts between his testimony and that of other key witnesses, his personal motivations to lie, and in light of the evidence presented by the Appellant at trial, the weight of the evidence in this case is clearly insufficient to support the jury’s verdict. The State argues that the appellants have waived the issue for failure to cite to any portion of the record and, in the alternative, that the evidence was sufficient to support the convictions.

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and “approved by the trial judge, accredits the testimony of the” State’s witnesses and resolves all conflicts in the testimony in favor of the state. State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994); State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked with a presumption of innocence, the jury verdict of guilty removes this presumption “and replaces it with one of guilt.” State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. Id. The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. See Tenn. R. App. P. 13(e); Harris, 839 S.W.2d at 75. In making this decision, we are to accord the State “the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom.” See Tuggle, 639 S.W.2d at 914. As such, this Court is precluded from reweighing or reconsidering the evidence when evaluating the convicting proof. State v. Morgan, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own “inferences for those drawn by the trier of fact from circumstantial evidence.” Matthews, 805 S.W.2d at 779.

Further, a conviction may be based entirely on circumstantial evidence when the facts are “so clearly interwoven and connected that the finger of guilt is pointed unerringly at the defendant and the defendant alone.” State v. Smith, 868 S.W.2d 561, 569 (Tenn. 1993) (quoting State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985)). If the trier of fact can determine from the proof that all other reasonable theories except that of guilt are excluded, the evidence is sufficient.

In this case, the appellants were convicted of second degree murder. A conviction for second degree murder requires proof that the defendant unlawfully and knowingly killed another. Tenn. Code Ann. §§ 39-13-201, -210(a). A person acts knowingly with respect to a result of the person’s conduct when the person is aware that the conduct is reasonably certain to cause the result. Tenn. Code Ann. § 39-11-302(b).

Viewed in the light most favorable to the State, the evidence produced at trial shows that the appellants intentionally shot and killed the victim after the victim called Atlanta Hardy a “bitch.” Mr. Carter saw both Carlos Hardy and Atlanta Hardy with guns and testified that he actually saw Atlanta Hardy shoot the victim. According to the testimony at trial, both appellants confessed to

killing the victim. Marion Ford testified that Carlos Hardy told her that he killed the victim and Samuel Holt stated that Atlanta Hardy told him that she killed the victim. While the appellants' testimony corroborated many details of other witnesses' testimony, they both claimed that they were not responsible for the victim's death. Obviously, the jury did not find either of the appellants to be credible witnesses. Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are to be resolved by the trier of fact. State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1991). The evidence, as presented, points the finger of guilt unerringly at the appellants. The jury could have properly inferred that the appellants were guilty of second degree murder. This issue is without merit.

Sentencing

Next, Carlos Hardy contends that "[t]he trial court in this case failed to enumerate how any enhancement factors were applied to determine the sentence." Specifically, Carlos Hardy argues that the "trial court simply found that a couple of the enhancement factors existed, then pronounced a sentence of 25 years, the maximum within the range." The appellant does not challenge the actual application of the enhancement factors. The State again argues that the issue has been waived for failure to make appropriate citations to the record. In the alternative, the State claims that the trial court conducted a full and fair sentencing hearing and made extensive findings regarding enhancement factors.

"When reviewing sentencing issues . . . , the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d). "However, the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In conducting our review, we must consider the defendant's potential for rehabilitation, the trial and sentencing hearing evidence, the pre-sentence report, the sentencing principles, sentencing alternative arguments, the nature and character of the offense, the enhancing and mitigating factors, and the defendant's statements. Tenn. Code Ann. §§ 40-35-103(5), -210(b); Ashby, 823 S.W.2d at 169. We are to also recognize that the defendant bears "the burden of demonstrating that the sentence is improper." Ashby, 823 S.W.2d at 169.

Turning more specifically to the facts of this case, the defendant was convicted of second degree murder. Since this is an A felony, the starting point for sentencing determinations is the middle of the range. See Tenn. Code Ann. § 40-35-210(c). Undisputably, this defendant was a Range I offender; thus, twenty years was the mid-point against which the trial court was to balance any mitigating and enhancement factors.

In balancing these concerns, a trial court should start at the presumptive sentence, enhance the sentence within the range for existing enhancement factors, and then reduce the sentence within

the range for existing mitigating factors. Tenn. Code Ann. § 40-35-210(e). No particular weight for each factor is prescribed by the statute. See State v. Santiago, 914 S.W.2d 116, 125 (Tenn. Crim. App. 1995). The weight given to each factor is left to the discretion of the trial court as long as it comports with the sentencing principles and purposes of our code and as long as its findings are supported by the record. Id.

In the case herein, the trial court sentenced the appellant as a Range I standard offender to twenty-five years for the second degree murder conviction to be served consecutively “to the sentence he was already serving on probation.” In determining the appellant’s sentence, the trial court found the following enhancement factors under Tennessee Code Annotated section 40-35-114 (2004):³ (2) the defendant has a previous history of criminal convictions or behavior in addition to those necessary to establish him as a Range I offender; (10) the defendant possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense; (14) the defendant committed the offense while on probation for another felony; and (17) the crime was committed under circumstances under which the potential for bodily injury to the victim was great. The trial court determined that no mitigating factors applied.

At the sentencing hearing, after hearing the evidence, reviewing the presentence report and hearing argument of counsel, the trial court made the following findings of fact and conclusions of law:

Carlos Hardy is in a different category. He’s not with the same prior history, although he’s had convictions and had problems before, He’s in the category where he’s in a Range I And the presumptive sentence for a Range I offender under this particular kind of case is twenty years. The sentence is anywhere between fifteen and twenty-five years, but, in a Class A felony, presumptively, you start at the mid-range, which is twenty.

In his case, I think he has, also a prior history of criminal behavior in addition to the ones that are necessary to establish that range. He has a previous history of unwillingness to comply with the condition of the sentence. In this case, he was on probation. Whether that applies or not, let’s forget that one. I’m just going to go with the first one. There is a firearm that was used in this case. I don’t know that that’s an element of the offense of Second Degree Murder. So I think that is a factor.

He, obviously, has no hesitation about committing a crime where the risk to human life was high. But I think, because of the fact that there was human life lost, I’m not going to consider that one. So we’ve still got the first one, primarily.

³Tennessee Code Annotated section 40-35-114 was amended in 2005. As part of the amendment, the enhancement factors found in the statute were renumbered. Because the appellant’s offense was committed prior to the enactment of the amendment, we will refer to the enhancement factors by their designations at the time of the offense.

He was, though, in this time, at this state on probation. So I think he is in a release status that applies in this case. And obviously, the circumstances under which this, potentially - - this happened, had a high potential for bodily injury, which, tragically, was the loss of [the victim's] life.

So I think those enhancement factors all apply to Mr. Hardy. I think he and Ms. Hardy were there together. And it's hard to determine who was what leader or what. Ms. Hardy has a more serious record than Carlos Hardy. And so you might assume that, possibly, she was the leader, even though that's a little unusual in certain cases where there's a man and woman involved in the situation, in this case that would be suggested. But that's not proven. That's not clear which one would be the leader. I'm not going to get into that.

But I think, in this case, that there are no mitigating factors that would apply to Carlos Hardy. And under the law, in his case, the sentence under the Second Degree Murder conviction, and the loss of the life of [the] young [victim], will be a sentence of twenty-five years with the Department of Corrections. And that sentence will run consecutively to the sentence he was already serving on probation.

After a de novo review, we note this Court has previously determined that the application of enhancement factor (17) in a second degree murder case is improper. See State v. Belser, 945 S.W.2d 776, 792 (Tenn. Crim. App. 1996). The question now becomes whether the remaining enhancement factors are enough to support Carlos Hardy's sentence. The trial court sentenced Carlos Hardy to twenty-five years based on the application of four enhancement factors and no mitigating factors. Despite the improper application of enhancement factor (17), we determine that the application of the remaining enhancement factors justifies the imposition of a twenty-five-year sentence. The appellant has failed to demonstrate that his sentence was improper. This issue is without merit.

Consecutive Sentencing

Finally, Carlos Hardy complains that "[t]he trial court erred in failing to specify exactly why the sentence in this case was ordered to be run consecutive to the sentence the Appellant was already serving." The State argues that the trial court properly ordered consecutive sentences.

A trial court may impose consecutive sentencing upon a determination that one or more of the criteria set forth in Tennessee Code Annotated section 40-35-115(b) exists. One of the provisions allowing consecutive sentencing provides that consecutive sentencing is warranted if "the defendant is sentenced for an offense committed while on probation." Tenn. Code Ann. § 40-35-115(b)(6).

In the case herein, the State introduced a certified copy of a judgment showing that Carlos Hardy was convicted of possession with intent to sell .5 grams or more of cocaine, a Class B felony, on March 8, 2000. As a result of the cocaine conviction, Carlos Hardy was sentenced to an eight-year split confinement sentence, serving one year in jail and the remainder of the sentence on probation. The victim was murdered on June 7, 2002. At the sentencing hearing, the trial court determined that the appellant committed the offense while on probation and ordered the sentence for second degree murder to “run consecutively to the sentence he was already serving on probation.”

This court has previously held that Tennessee Code Annotated section 40-35-115 applies where the trial court sentences the defendant for an offense committed while on probation. See e.g., State v. Moore, 942 S.W.2d 570, 573 (Tenn. Crim. App. 1996). Further, the trial court herein had a basis for concluding that consecutive sentences were necessary to protect the public. Because the crime was committed while the appellant was on probation, he had demonstrated a lack of amenability for rehabilitation. Additionally, the appellant had prior convictions. In other words, further crimes committed by the appellant appear to be likely, unless he is incarcerated. Due to his prior record and his failure to demonstrate any rehabilitative qualities, we must also conclude that the terms of the sentence are reasonably related to the severity of the offenses. The trial court properly ordered the appellant to serve his sentence for second degree murder consecutively to his sentence for possession of cocaine with intent to sell. This issue is without merit.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE